

Gaming Law

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What's the Next Step for the Foxwoods License?

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Special to the Legal

On Dec. 16, 2010, the Pennsylvania Gaming Control Board (PGCB) revoked the Category 2 slot machine license that had been awarded to the "Foxwoods Group" almost four years ago to develop and operate a gaming facility on Columbus Boulevard in Philadelphia.

In those four years, the Foxwoods Group, among other things, negotiated a development agreement with the city of Philadelphia; was refused zoning of the property by City Council and had to resort to the Pennsylvania Supreme Court for an order to rezone; witnessed its partner, Foxwoods, struggle financially, resulting in the collapse of the financing for the project; planned and abandoned a relocation of the project into Center City; got hit with significant fines by the PGCB for the delay in opening the casino; brought in Steve Wynn to save the project, only to have Wynn abruptly walk away; and brought in Harrah's (now Caesars) to save the project but could not get the Harrah's deal to the finish line in time.

Despite these efforts, the Foxwoods Group was unable to overcome the two fundamental problems with the Foxwoods proposal — a lack of financing and a location that made it fiscally impossible to



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adequately accommodate the traffic expected to result from a full-scale development.

The Foxwoods Group has petitioned the PGCB for reconsideration, and on Jan. 21, 2011, it filed an appeal in the Commonwealth Court. It is anticipated that the appeal will ultimately end up in the Pennsylvania Supreme Court and the process is expected to take at least three years.

For the purpose of this article, we are presuming that the Foxwoods Group does not get a court-ordered reprieve, although it is reasonable to assume that a stay of the license will be issued by the court while the appeal is pending. Such a stay would proba-

bly delay any action on the license until the appeal process runs its course. We make the presumption that the appeal will not be successful both because we think it is unlikely and because it would make this a rather dull article.

A RANGE OF OPTIONS

The question is, what happens next with the Foxwoods license? There are many options, some more realistic, some more complicated than others.

- Should the PGCB wait things out and then reopen the application process in Philadelphia after the appeals are complete to see if any one is still interested in the Foxwoods license?
- Will the legislature amend the Pennsylvania Race Horse Development and Gaming Act to permit the issuance of the Foxwoods license anywhere in the commonwealth?
- Will the legislature amend the Gaming Act, as has been proposed, to auction the Foxwoods license to new bidders? And if so, where?
- Should the Gaming Act be amended to permit the Foxwoods license to be reissued in areas within the 10-mile protected zones of the existing Philadelphia Category 1 casinos to make more opportunities available?
- Should the restriction on owning more than 33 percent of a second casino be relaxed to increase the potential applicants for the license?

- Should the legislature divide up the Foxwoods license into multiple smaller boutique licenses, which could be issued for Philadelphia?

- Would Foxwoods consider dismissing its appeal and join in any new casino proposals?

- Or, finally, will the anti-gaming forces in the legislature simply use the Foxwoods appeal as a way to forestall any further expansion of gaming in the commonwealth?

REBIDDING CHALLENGES

While the range of options is extensive, the simplest option would be for the PGCB to wait until after the appeals and then reopen the application process in Philadelphia for the Foxwoods license. Although such a delay could mean that it would be at least six or seven years before another casino is opened in the city, the delay could also be a positive factor, as the economy should have time to improve, making a casino development more desirable. And as already witnessed, the capital markets are beginning to loosen up, albeit slowly.

For example, the Revel project in Atlantic City earlier this month finally lined up the necessary financing to restart construction. It is anticipated that the capital markets will open up further during the anticipated three-year appeal period, thus making more capital available and lead to potentially more companies interested in developing a casino in Philadelphia. And, of course, the more capital that is available, the better the project companies will be willing to develop.

One of the arguments against this option is that the Philadelphia gaming market is already saturated, and thus there is no longer a need for an additional casino in the city. This position has been advanced by former Gov. Edward G. Rendell, as well as other politicians and in informal polling. However, it can be argued that the tightened capital markets are a contributing cause of the lower-than-anticipated revenues produced to date at certain other Pennsylvania casinos, including Sugarhouse.

The original Sugarhouse plans entailed a more elaborate development, including significantly more entertainment and dining options. Those plans were dramatically scaled back in the initial phase as financing became more difficult and expensive to obtain. When further financing becomes available, Sugarhouse has already-approved plans for second and third phases of developments to add banquet space, more gaming floor and other entertainment/dining options, which should make it into a full-service gaming destination and thus increase its revenues.

However, other challenges exist with rebidding the Foxwoods license in Philadelphia. First of all, there are not many locations left in the city large enough to satisfy the necessary footprint for a 3,000 machine facility with sufficient parking that do not have overwhelming neighborhood and traffic issues like those that plagued the Foxwoods project from the outset and would further tie up a new development; and that do not violate the 10-mile protective zones surrounding the Category 1 licenses at Harrah's Chester

and Parx. These statutory zones essentially remove a significant portion of the city's geography from consideration, including the northeast section of the city above Tacony Creek and the southwest portion of the city, including a part of the sports complex area.

Unfortunately, the portion of the city's geography that remains is the oldest and most densely developed. Where there are large blocks of land — for example, at the Navy yard and the sports complex — the infrastructure challenges are daunting. The Philadelphia Gaming Advisory Task Force's traffic analysis is now outdated, but it is still the best information available on the subject, and the report is clear that many of the proposed casino sites have difficult, if not insurmountable, traffic issues.

As the developers of Sugarhouse and Foxwoods found out, zoning in Philadelphia can be a challenge unless the legislature removes that right from the city, which does not seem likely. Despite the best efforts of the Street administration, City Council was unwilling to pass zoning ordinances to address either Sugarhouse or Foxwoods, and the Supreme Court had to intervene. And, as we saw when a move to Center City was proposed, a change to a new neighborhood would simply lead to a new round of fights over locations and, likely, another trip to the Supreme Court.

Ultimately, what this means is that unless the city and the parties get together on a site, simply rebidding the Foxwoods license in Philadelphia would likely result in significant further delays, with a project possibly not opening until over a decade after the initial Foxwoods project was awarded the license.

POSSIBLE LEGISLATIVE MOVES

The other options require legislative amendments to the Gaming Act and could potentially set off numerous challenges if not done with the cooperation of the existing licensees.

The “simplest” and most likely amendment would be to allow the relocation of the Foxwoods license anywhere in the commonwealth. In fact, this has already been proposed in House Bill 65. But it is unclear if there is sufficient demand for a 3,000 machine facility anywhere else in the state. Further, as has been evident in the application process for the Category 3 “resort” licenses, the existing licensees are very fearful of cannibalization of their revenue base. And the resort licenses are only for up to 600 slot machines and 50 table games. Imagine the challenge to a proposed 3,000 machine facility, especially from a casino owner who did not bargain for further competition when it paid its \$50 million license fee and made a significant capital investment in its casino.

A different amendment might be to relax the 10-mile protective zones in Philadelphia. Reducing the 10-mile radius around the Chester casino by a few miles would allow a casino at Philadelphia International Airport, and even reducing it by a few hundred yards would allow a casino at the former site of the Spectrum.

Another amendment, relaxing the 33 percent ownership limitation in a second casino, would enable the existing licensees who are already familiar with the Pennsylvania gaming environment to step up. In such case, for example, Caesars could agree to a reduction of the radius and apply for a sec-

ond casino close to its Chester facility. Or one of the other licensees could decide to come into Philadelphia.

Finally, it might be an option for the legislature to divide the Foxwoods license in to multiple smaller “boutique” license. They could do this by creating a new Category 4 license in lieu of the Foxwoods license. Smaller casinos, such as 600 machines as with the resort licenses, might be more enticing in the current market and would have significantly lower traffic and location restrictions. Thus, they could potentially be located, among other places, near the Sports Complex, the Convention Center or 30th Street Station.

Any cannibalization impact on the revenues of the existing casinos would need to be considered. However, each of the existing Philadelphia licensees could be offered first option to the licenses.

As attractive as the smaller casinos might be from a planning perspective, there is a significant statutory hurdle to their implementation. Section 1209 of the Gaming Act requires the refund, on a declining basis, of the \$50 million license fees paid by the licensees in the event that the number of Category 2 licenses is increased. Therefore, the cooperation of the existing licensees is essential for this option to be realistic as the commonwealth with its budget issues cannot afford to repay even a single dollar.

As we have explored, there are plenty of options for the future of the Foxwoods License, some more workable than others, some more complicated than others. But the one option economically not in the best interest of the city or the commonwealth is to let the license go unissued. In times of

budgetary crunches, all involved need to work together, get creative and find a way to reissue the Foxwoods license within a reasonable time frame — a \$50 million license fee and millions in annual tax revenues go a long way. •